BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2021-88-E

South Carolina Energy Freedom Act (H.3659) Proceeding to Establish Dominion Energy South Carolina, Inc.'s Standard Offer Avoided Cost Methodologies, Form Contract Power Purchase Agreements, Commitment to Sell Forms, and Any Other Terms or Conditions Necessary (Includes Small Power Producers as Defined in 16 United States Code 796, as Amended) – S.C. Code Ann. Section 58-41-20(A)	)	Docket No. 2021-88-E

DIRECT TESTIMONY OF STEVEN J. LEVITAS

ON BEHALF OF

THE CAROLINAS CLEAN ENERGY BUSINESS ASSOCIATION

July 27, 2021

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. Steven J. Levitas. My business address is 130 Roberts Street, Asheville, North Carolina 28801.

Q. WHAT IS YOUR OCCUPATION?

A. I am the Senior Vice President for Regulatory and Government Affairs for Pine Gate Renewables, LLC.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND EXPERIENCE.

A. I received a B.A. from the University of North Carolina at Chapel Hill in 1976 and a J.D. with Honors from Harvard Law School in 1982. After clerking for a federal district court judge, I spent four and half years as a commercial litigator before becoming Director and Senior Attorney in the North Carolina office of the Environmental Defense Fund, a national public interest advocacy organization. In 1993, North Carolina Governor Jim Hunt appointed me to serve as Deputy Secretary of the North Carolina Department of Environment, Health, and Natural Resources. Following my four-year tenure in that position, I spent the next twenty years as a partner in two private law firms where my practice was focused on environmental and energy matters. During the last six of those years, a particular emphasis of my practice was representing renewable energy companies, including the owners of "Qualifying Facilities" or "QFs" under the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 824a-3 *et seq.*, in the negotiation of power purchase agreements ("PPAs") and renewable energy credit/certificate ("REC") purchase agreements with utilities, particularly with Duke Energy Carolinas ("DEC") and Duke Energy Progress ("DEP")(collectively, "Duke") in

North and South Carolina. Over a period of several years, I was heavily involved in negotiations with attorneys for Duke regarding the model PPA that was the basis for the Large QF PPA proposed by Duke in Docket Nos. 2019-185-E and 2019-186-E. I was also frequently called upon to talk to investors and lenders about their requirements with respect to the terms and conditions of such agreements and to assist in resolving concerns about proposed agreements. In addition, I represented the North Carolina solar industry in connection with the North Carolina Utility Commission's ("NCUC") approval of standard offer PURPA PPA terms and conditions and represented a group of QFs in litigation against Dominion North Carolina Power before the NCUC concerning the formation of "legally enforceable obligations" or "LEOs" under PURPA.

Q. PLEASE DESCRIBE YOUR EMPLOYMENT IN THE SOLAR INDUSTRY.

A. In January of 2016, I became Vice President for Business Affairs and General Counsel for FLS Energy, Inc. ("FLS"), a North Carolina-based utility scale solar developer. In that capacity, I continued to be involved with PPA and REC agreement terms and conditions. In addition to ongoing negotiations with Duke about PURPA PPA matters, I engaged in extensive PURPA PPA negotiations with attorneys for NorthWestern Energy in Montana and led FLS's successful challenge at the Federal Energy Regulatory Commission ("FERC") to the Montana Public Service Commission's unlawful implementation of PURPA.

In January of 2017, following the acquisition of FLS by Cypress Creek Renewables, I was appointed to the position of Senior Vice President for Regulatory Affairs and Strategy at Cypress Creek Renewables, a position I held until joining Pine Gate in September of 2019. In that capacity, I was responsible for and managed all aspects of policy, regulatory, and

government affairs activity at Cypress Creek, including our work on policy development relating to PURPA policy and PPA terms and conditions in several states and at the federal level. I was heavily involved on behalf of Cypress Creek and the solar industry in FERC's revisions to its PURPA rules that culminated in Orders 872 and 872-A, including playing a major role in the development of the Solar Energy Industries Association's extensive comments on PURPA reform filed at FERC and participating in more than dozen meetings with FERC Commissioners and staff regarding PURPA.

While at Cypress Creek, on several occasions I reviewed and provided internal comments on PPAs being negotiated with South Carolina Electric & Gas, the predecessor of Dominion Energy South Carolina, Inc. ("DESC").

I have also had extensive involvement with PURPA matters in Michigan, including, in addition to the testimony I describe below, (1) representing the solar industry in largely successful negotiations regarding Consumers Energy Company's ("Consumers") proposed Standard Offer Tariff and Standard Offer Power Purchase Agreement ("Consumers PPA") in MPSC Case No. U-18090; (2) challenging Consumers' refusal to enter into PURPA PPAs with QFs owned by Cypress Creek; (3) playing a leading role in successfully resolving Cypress Creek and other solar developers' disputes with Consumers about their rights under PURPA; and (4) being an active participant in the Michigan PSC's ongoing rulemaking concerning PURPA and LEO formation.

I was also heavily involved with the development and passage of H.B. 589 in North Carolina, which modified the state's implementation of PURPA and was one of the principal authors of the section of H.B. 3659 dealing with PURPA. Finally, I have been a frequent speaker and presenter on PURPA across the country.

Q. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS PROCEEDING?

A. I am testifying on behalf of the Carolinas Clean Energy Business Association ("CCEBA").

Q. HAVE YOU FILED TESTIMONY WITH THIS COMMISSION PREVIOUSLY?

A. Yes. I filed testimony in Docket Nos. 2019-184-E, 2019-185-E and 2019-186-E addressing PURPA-related issues and the utilities' proposed form power purchase agreements ("PPAs"). I also testified in 2020 in the Docket No. 2019-365-E regarding competitive procurement. In addition, on two occasions I have participated in allowable ex parte briefings to this Commission where the principal focus of my presentations was on PURPA.

Q. HAVE YOU FILED TESTIMONY WITH OTHER PUBLIC SERVICE COMMISSIONS?

A. Yes. I filed Direct Testimony on April 11, 2018 in MPSC Case No. U-18090 regarding Consumer Energy Company's ("Consumers") proposed Standard Offer Tariff and Standard Offer Power Purchase Agreement ("Consumers PPA"). In my Direct Testimony, I described my concerns with multiple terms and conditions proposed in the Consumers PPA. I similarly filed Direct Testimony on April 23, 2019 in MPSC Case No. U-18091 regarding DTE Electric Company's proposed Standard Offer Tariff and Standard Offer Power Purchase Agreement.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. I will discuss and comment on DESC's proposed revisions to the Large QF PPA and "Notice of Commitment to Sell" form previously approved by this Commission in Docket 2019-184-E. I will also briefly discuss the importance of establishing a fixed variable

integration charge ("VIC") in this proceeding for all existing DESC PPAs and those entered into between now and any future adjustments to the VIC.

Q. ARE YOU SPONSORING ANY EXHIBITS?

A. No.

Q. COULD YOU EXPLAIN THE BASIC PURPOSE AND REQUIREMENTS OF PURPA?

A. PURPA was enacted by Congress in 1978 and amended most recently in 2005. A major purpose of Section 210 of PURPA is to diversify the nation's electric energy supply by requiring electric utilities to purchase the output of small (i.e., less than 80 MW) independently owned alternative energy projects (referred to "Qualifying Facilities" or "QFs") at the cost the utility would otherwise incur to generate power itself or purchase it from other sources – referred to as the utility's "avoided cost." Congress required FERC to establish broad guidance regarding the implementation of PURPA, which it has done through rulemaking and numerous orders, but left many of the details of PURPA implementation to the states, subject to compliance with FERC's directives. There are several aspects of PURPA that are particularly relevant to this proceeding. First, based on its view that smaller QFs would have a particularly difficult time negotiating with large monopoly utilities, FERC has required state commissions to adopt pre-approved avoided cost rates for QFs with a capacity of 100 kW or less – referred to as the "standard offer" – and has given states the authority to extend the standard offer to larger QFs. 18 C.F.R. § 292.304(c). States also may establish standard PPA terms and conditions for any size QF. Second, also out of a concern about utility bargaining power and potential recalcitrance, FERC has provided that a QF, in the absence of a formal contract, may obligate a utility to

purchase its power at the current avoided cost rate by unequivocally committing itself to sell that output to the utility, thereby establishing a LEO to sell power to the utility, and for the utility to purchase that power. 18 C.F.R. § 292.304(d); *JD Wind 1, LLC*, 130 FERC ¶ 61,127, 61,631 (2010).

Q. WHAT STANDARD DO YOU THINK THE COMMISSION SHOULD APPLY IN REVIEWING DESC'S PROPOSED DOCUMENTS?

A. I refer throughout my testimony to a standard of "commercial reasonableness." I believe that both PURPA and Act 62 require this Commission to approve contract and NOC terms and conditions that strike a reasonable balance between the legitimate business interests of the QF and those of the utility in light of generally prevailing practice in the industry. Contract terms that make it extremely difficult or impossible to finance QF development do not strike that balance and are discriminatory towards QFs. One way to judge commercial reasonableness is by considering terms that have been contained in prior PPAs. However, that factor is not necessarily decisive because a prior PPA may have been financed with great difficulty or at higher cost, or a term in such a PPA may simply not strike a reasonable balance between the competing interests.

DESC's Large QF PPA

Q. IN YOUR OPINION ARE DESC'S PROPOSED CHANGES TO ITS PPA COMMERCIALLY REASONABLE?

A. DESC is seeking to modify form documents that were previously approved by this Commission after extensive litigation. In all cases DESC is introducing new commercial terms not contained in the PPAs it previously presented to this Commission. In most cases, I believe these modifications are not commercially reasonable and should be rejected by

the Commission. In addition, I discuss one concern I have regarding language contained in the existing form PPA.

Q. IN WHAT RESPECTS ARE THE PROPOSED CHANGES TO THE LARGE QF PPA NOT COMMERCIALLY REASONABLE?

A. Below, I discuss four problems with DESC's proposed changes to the PPA. First, DESC has removed the option of a Seller's using cash collateral as a Performance Assurance measure. Second, DESC has increased insurance requirements beyond what is commercially reasonable. Third, DESC has modified the surety bond requirement in a manner that will make it virtually impossible for QFs to utilize the surety bond option for Performance Assurance. Fourth, DESC's PPA requires the QF to convey ancillary services, including reactive power, to DESC, but it is unclear whether the value of these services is included in DESC's avoided cost rates. In addition, I believe the delivery and compensation for reactive power is more appropriately addressed in an interconnection agreement ("IA") between a utility and an interconnection customer.

Q. IS THE PROPOSED REMOVAL OF CASH COLLATERAL AS A PERFORMANCE ASSURANCE MEASURE COMMERCIALLY REASONABLE?

A. No, it is not. DESC has heretofore provided the QF with the following options for providing the required Performance Assurance: (1) a letter of credit; (2) cash collateral; (3) a parent guarantee; (4) a surety bond; or (5) any other form of assurance reasonably acceptable to DESC. The Performance Assurance measures provide protection to ratepayers in the event of QF non-performance under the PPA. DESC's witness Folsom justifies removal of the cash collateral option on the grounds that while SCANA accepted cash collateral prior to its acquisition by Dominion Energy, Inc., Dominion Energy, Inc.

does not accept cash deposits of this nature and DESC does not believe this will materially impact developers going forward because there are no currently effective PPAs that utilize this option.

No rationale is provided, however, for why Dominion Energy Inc. has decided not to accept cash collateral nor is it obvious what difficulty is presented in doing so. In my experience, it is common industry practice for utilities to accept cash as PPA performance assurance. Cash collateral is a lower cost form of performance assurance than a letter of credit, which typically requires the obligor to pay a third-party service fee as well as posting cash collateral with the provider. While a surety bond can be a cost-effective option relative to cash collateral, even without the onerous bond form terms now proposed by DESC, the availability of surety bonds in the market is uncertain and unpredictable and varies depending on the credit profile and performance history of the obligor. But for DESC to simultaneously propose to eliminate the cash collateral option and, as I discuss below, to replace the current Commission-approved bond form with one that is totally unworkable in the market, is particularly troubling. Indeed, in observing that there are "no currently-effective PPAs" that utilize cash collateral as performance assurance (Folsom p. 20), DESC fails to point out that that is because companies like Pine Gate have been using the currently viable surety bond option that DESC now proposes to eviscerate.

Q. ARE DESC'S PROPOSED INSURANCE CHANGES COMMERCIALLY REASONABLE?

A. No. The proposed insurance changes are unjustified and are unreasonable in two primary respects: (1) new timing for certificate of insurance delivery, and (2) revised coverage amounts. On the first item, the current PPA requires that a certificate of insurance be

delivered to Buyer "at least fifteen calendar days" before start of work at Facility. The proposed PPA, however, would require delivery "within 20 days of Buyer's request." No rationale is provided for this change beyond conforming with Dominion Energy Inc's "requirements" for such notice. (Folsom p. 23.) However, Dominion Energy Inc's prevailing corporate practice is not a compelling reason for a proposed change that appears to give DESC unfettered discretion to require proof of insurance at any time after a PPA is signed – even far in advance of any possible construction activities. The existing language, by contrast, is keyed to the start of work at a facility – the relevant time period for insurance coverage to begin. The proposed change would impose unnecessary costs and burdens on QFs and should be rejected as commercially unreasonable.

The second issue with regard to the proposed changes to insurance requirements are significantly increased minimum coverage requirements. For example, while the current PPA requires minimum general liability insurance coverage of one-million dollars ($1,000,000) per occurrence and two-million dollars ($2,000,000) aggregate, the proposed PPA doubles those requirements to two-million dollars ($2,000,000) per occurrence and four-million dollars ($4,000,000) in aggregate. Similarly DESC has proposed increasing the Worker's Compensation–Employer's Liability Insurance minimum coverage from one-million dollars ($1,000,000) minimum to two-million dollars ($2,000,000) each employee for bodily injury by accident or disease. Finally, DESC for the first time proposes to require Comprehensive Automobile Liability insurance, with bodily injury and property damage total with a combined single limit of at least two-million dollars ($2,000,000).

Arbitrary increases in the amount and scope of insurance that a QF developer must carry increase the cost of QF projects and needlessly discriminates against independent power

producers. CCEBA believes the current required coverage levels, which were previously proposed by DESC and approved by this Commission, should be maintained as commercially reasonable and the new automobile minimum coverage should be limited to one-million dollars ($1,000,000).

Q. HOW IS DESC PROPOSING TO CHANGE THE FORM OF SURETY BOND?

A. DESC is actually proposing to replace the surety bond form that it previously proposed and that this Commission approved with an entirely new bond form containing commercially unreasonable terms. No rationale for this material change is provided beyond Dominion's corporate practice. I therefore believe that the Commission should reject the new surety bond form in its entirety and leave the current, previously approved form in place.

Q. PLEASE DESCRIBE SOME OF THE SPECIFIC PROBLEMS WITH DESC'S PROPOSED NEW SURETY BOND FORM.

A. Two aspects of the new surety bond form are particularly unreasonable and should be rejected even if the proposed new form is not rejected in its entirety. First, DESC proposes to change the time period within which the surety must make payment under the bond. Under the existing bond form , the surety must pay within 15 days of demand. DESC now proposes to make payment due within 10 days after demand. The only rationale provided for this proposed change, as with the other proposed changes to the surety bond form, is DESC's objective of conforming with directives of its corporate parent, Dominion Energy, Inc. In my experience surety providers consider a 10-day payment period to be too short and are often unwilling to execute surety bonds containing such a short payment period.

The 15-day payment period is the minimum that is commercially reasonable and should be maintained.

The second proposed change concerns the waiver of surety defenses. The current surety bond form does not require the surety to waive legal defenses to payment that it is otherwise entitled to assert under state law. However, DESC now proposes to require a Surety to waive all rights and defenses, counterclaims, setoffs, cross-claims, or any other claim that Surety or Principal may have. In other words, even though the surety may have a legal right under the applicable governing law to assert as defense – such as that the QF did not actually breach the PPA – DESC would force the surety to forego all such legal defenses. In my experience, this type of a waiver provision is a poison pill that will very likely dissuade any surety from issuing a bond in favor of a QF.

Q. PLEASE EXPLAIN WHAT ANCILLARY SERVICES ARE.

A. While I am not an electrical engineer, my understanding is that ancillary services include services necessary to maintain the integrity of the transmission system during a transaction, such as reactive supply and voltage control from generation. Reactive supply and voltage control from generation are needed to control transmission system voltage within appropriate ranges so the transmission grid will function reliably and allow for the transmission of real power across transmission lines. Because transmission lines dissipate reactive power more quickly than real power, reactive power cannot be efficiently transferred over long distances on transmission lines, and a utility transmission provider needs localized generating resources to provide reactive power.

Q. ARE ANCILLARY SERVICES REFERENCED IN THE ENERGY FREEDOM ACT?

A. Yes, they are. Section 58-41-20 of the South Carolina Code requires that "each electric utility's avoided cost methodology fairly accounts for costs avoided by the electric utility or incurred by the electric utility, including, but not limited to, energy, capacity, and ancillary services provided by or consumed by small power producers…."

Q. WHAT DOES THE PROPOSED PPA SAY ABOUT ANCILLARY SERVICES?

A. The PPA definition of "Energy" includes "all electrical products produced by or related to the Facility, including spinning reserves, operating reserves, balancing energy, regulation service, ramping capability, reactive power and voltage control, frequency control and other ancillary or essential reliability service products, or any benefit Buyer otherwise would have realized from or related to the Facility if Buyer rather than Seller had constructed, owned or operated the Facility, it being the Parties' intent that *all such benefits and entitlements* in addition to electrical output that flow to the owner or operator of the Facility … *belong to Buyer at no additional cost to Buyer*."

Q. DOES DESC COMPENSATE QFs FOR ANCILLARY SERVICES PURSUANT TO ITS AVOIDED COST METHODOLOGY FOR ENERGY OR CAPAPCITY?

A. Not to my knowledge, but if so, DESC should be required to document that.

Q. HOW DO YOU RECOMMEND THAT THE COMMISSION HANDLE THIS ISSUE?

A. I believe that the Commission should require DESC to document that its avoided cost rates include the cost of procuring ancillary services that are avoided by virtue of its purchase of "energy" from QFs under PURPA PPAs. In addition, specifically with respect to reactive power, I believe that that is a service that is required by the utility in its role as grid operator and provider of transmission services, not in its role as the provider of generation services.

I therefore believe that the conveyance of and compensation for reactive power is properly dealt with in the interconnection agreement between the parties and not in the PPA. DESC's standard IA explicitly requires that it pay the Interconnection Customer for reactive power that the Interconnection Customer provides or absorbs outside of a prescribed range required by the IA, as well as for reactive power within that prescribed to the extent that DESC pays its own or affiliated generators for reactive power within that prescribed range. *See* DESC IA, Section 1.9. In sum, I encourage the Commission to ensure that QFs are properly and fairly compensated by DESC for ancillary services, including reactive power.

DESC'S Proposed Notice of Commitment to Sell Form

Q. DO YOU ALSO HAVE CONCERNS ABOUT DESC'S PROPOSED NOTICE OF COMMITMENT ("NOC") FORM?

A. Yes I do.

Q. PLEASE EXPLAIN THE BACKGROUND AND PURPOSE OF A NOC FORM.

A. The NOC Form originates from the concept that utilities should be prevented from circumventing PURPA's requirements by refusing to enter into a contract with the qualifying facility. *See* FERC Order No. 69, FERC Stats. & Regs. ¶ 30,128, *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), a*ff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983). FERC has noted that a utility can frustrate a QF's PURPA rights by delaying the signing of a contract, so that a later and lower avoided cost is applicable. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at p. 5 (2011). Accordingly, FERC has provided that establishment of a LEO should

turn solely on the QF's *commitment*, and not the utility's actions. *FLS Energy Inc.*, 157 FERC ¶ 61, 211 (December 15, 2016) at 9. In short, PURPA requires that QFs may unilaterally form LEOs by unequivocally committing to sell their output to the utility. And because establishment of a LEO must turn on the QF's actions and not the utility's, a state cannot require a QF to achieve certain milestones in the interconnection process as a condition of establishing a LEO. FERC has also held that states cannot impose requirements that create "unreasonable obstacles" to LEO formation. *Hydrodynamics, Inc.*, 146 FERC ¶ 61,193 (Mar. 20, 2014) at 16.

Q. IN YOUR OPINION WHAT MUST A QF DO TO FORM A LEO?

A. The QF must make a binding commitment to sell its output to the utility at a defined price.

Q. HAS FERC ADDRESSED THE ISSUE OF LEO FORMATION IN ITS ORDERS 872 AND 872-A?

A, Yes it has, FERC has required the state to establish standards for LEO formation that require a QF developer to demonstrate the commercial viability of its project and its financial commitment as conditions of LEO formation.

Q. DO YOU BELIEVE THAT DESC'S PROPOSED MODIFIED NOC FORM IS CONSISTENT WITH THIS STANDARD?

A. In general, yes. But DESC proposes a number of changes to the NOC form that in my opinion are not consistent with FERC's standard and are not commercially reasonable..

Q. PLEASE DESCRIBE THOSE PROBLEMATIC CHANGES.

A. First, in item 4(iii), DESC proposes to require the QF has either commenced construction or taken meaningful steps to obtain control of the Project Site "in order to commence construction of the Facility." Second, in item 4(iv), DESC proposes a requirement that the

QF prove it has at least submitted the applications and filing fees necessary to secure "all local permitting and zoning approvals." Third, item 8(ii) provides that the NOC terminates if the Seller has not executed a PPA within 90 days of the NOC's submittal, regardless of whether a PPA has been tendered by the utility.

Q. WHAT IS YOUR OPINION REGARDING NOC ITEM 4(iii), WHICH MAKES A LEO FORMATION CONTINGENT ON OBTAINING SITE CONTROL NEEDED TO COMMENCE CONSTRUCTION?

A. I have no problem with site control being a prerequisite to LEO formation, provided that site control can be demonstrated through a binding and enforceable option to purchase or lease the site, not just through a fully consummated purchase or lease. However this provision should make to reference to commencing construction. Readiness to begin construction of a project is not a reasonable or permissible requirement for formation of a LEO. As discussed below, the NOC establishes a deadline for PPA execution by the QF, and it is that PPA which then governs the QF's obligations with respect to constructing a facility and placing it in service. Because readiness to commence construction is not germane to formation of a LEO, the changes proposed in item 4(iii) referencing construction should not be adopted.

Q. REGARDING NOC ITEM 4(iv), SHOULD A LEO BE CONTINGENT UPON APPLYING FOR ALL LOCAL PERMITS AND ZONING APPROVALS?

A. No, it should not. Many local permits, such as electrical permits, building permits and stormwater plan approvals cannot be, and are not typically, applied for until close to the time that construction commences. As this Commission and FERC have recognized, QFs need to be able to secure firm project pricing through LEO formation and eventually PPA

execution before having to incur very large project development costs. It is unreasonable to expect a QF to incur these expenses until it has secured a price for its output so that it can in turn secure financing for the project. Because LEOs are formed early in the life of a project and long before the facts regarding a project's layout and detail are finalized, the project sponsor will likely lack the information needed to meaningfully apply for granular approvals such as stormwater and construction permits. DESC's proposed changes to item 4(iv) of the NOC form should therefore not be adopted.

Q. DO DESC'S PROPOSED PPAS REQUIRE THE QF TO HAVE OBTAINED ALL PERMITS AND LAND-USE APPROVALS BEFORE THE CONTRACT MAY BE EXECUTED?

A. No. However, the PPAs do require that such permits be obtained prior to the date of commercial operation, which comes at the end of the construction phase. That makes sense.

Q. IS THERE ANY LOGIC TO CONDITIONING A LEO ON HAVING APPLIED FOR THE SAME PERMITS THAT THE PPA REQUIRES TO BE IN HAND PRIOR TO COMMERCIAL OPERATION?

A. None that I can discern.

Q. REGARDING NOC ITEM 8(ii), SHOULD A LEO TERMINATE FOR FAILURE TO SIGN A PPA IF THE UTILITY HAS NOT TENDERED A PPA TO EXECUTE?

A. No, it should not. Item 8(ii), by providing that the NOC terminates if the Seller has not executed a PPA within 90 days of the NOC's submittal, regardless of whether a PPA has been tendered by the utility, interposes a condition that is beyond the Seller's control. That is contrary to the purpose of a LEO, which upon being created gives the QF a right to sell

its output on specified pricing and terms. To remedy this problem, the language in item 8(ii) should be revised to say that the NOC terminates "the later of (i) within 90 business days after the Submittal Date, or (ii) within 60 business days after receipt of an executable PPA from Company."

Q. PLEASE DESCRIBE THE STATUS OF DESC'S VIC.

A. In Docket No. 2019-184-E, this Commission approved an ***interim*** VIC applicable to certain existing and all prospective DESC PPAs of $0.96 per megawatt hour. The Commission required that additional study and analysis be performed to calculate the VIC with greater precision and confidence and provided that amounts paid based on the interim VIC would be trued up once the interim VIC is revised. In this proceeding, the parties are now presenting their testimony and evidence regarding adjustments to the interim VIC.

Q. PLEASE EXPLAIN YOUR CONCERN ABOUT THE NEED FOR A FIXED VIC?

A. The fact that an interim VIC has been in place for the past two years has created considerable uncertainty and difficulty for QFs. Given the possibility that the interim VIC could be adjusted upward, developers of new QFs have faced considerable uncertainty about the economics of their projects, which has made it more complicated and difficult to execute PPAs, incur development expenses, and secure project financing. Similarly, because of this uncertainty the potential sale of projects in operation or development with PPAs that include a VIC has been considerably more challenging.

Q. WHAT DO YOU RECOMMEND TO ADDRESS THESE CONCERNS?

A. I respectfully request that in this proceeding the Commission establish a fixed VIC going forward. While I leave the calculation of an appropriate VIC to CCEBA witness Burgess, I believe that the VIC should be fixed by the Commission in this proceeding and should

remain in effect for the life of the PPA. With a fixed VIC, developers and financing parties can determine the likely impact on revenue streams and structure their transactions based on a common understanding of the project's value proposition. Continued uncertainty about the impact of the VIC on project economics will complicate and potentially impede QF development, thereby thwarting the aims of PURPA and the Energy Freedom Act. It is thus essential that this Commission, whatever VIC values it decides upon, fix them in a way that avoids uncertainty and provides clarity for project developers and financing parties going forward.

DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.